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Canadian Environmental Law Association
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THE RESPONSE OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTRY OF THE ENVIRONMENT'S BLUEPRINT ON WASTE MANAGEMENT

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I. INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest environmental law organization. In our capacity we have acted as counsel for citizens groups attempting to resolve conflicts arising from the siting of new waste disposal facilities, the operation of existing facilities and impacts from abandoned sites. In addition, the Canadian Environmental Law Association, along with its sister organization, the Canadian Environmental Law Research Foundation, engages in legal research and law reform. In June, 1983, the two organizations hosted a roundtable discussion on Hazardous Waste Management in Canada: The Legal and Regulatory Response.

The Blueprint promotes some very commendable principles and objectives. These objectives are not new, and in some cases the Ministry has been considering their implementation for several years. We support and encourage the Ministry to enact appropriate legislation and policies that will best bring about a realization of these objectives which are listed on page 3 of the Blueprint. They are as follows:

- the active participation of the public in the decision-making process;
- consistent long-term planning;
- a minimum use of landfill;
- perpetual care of all waste sites;
- firm control through legislation, regulation and guidelines;
- research and optimum use of up-to-the-minute worldwide scientific knowledge; and

- processes that ensure that waste, once disposed, does not damage the environment or put the public at risk through human interference or natural processes.

We especially support the call for active public participation in the process. The public must be regarded as an integral part of waste management decision-making. However, public participation must be genuine. It is not sufficient if it remains a token gesture.

II. REDUCTION, REUSE, RECYCLING AND RECOVERY

We also support the call for the minimal use of landfill sites. We strongly urge the Ministry of the Environment to provide a framework for the implementation of alternatives to landfill disposal such as recycling, reuse, recovery and reduction of waste streams.

The environmental and health risks associated with land disposal are well known and have been documented. Therefore, there is a need for environmentally acceptable alternatives for dealing with the enormous volumes of hazardous and non-hazardous wastes that we produce. Most citizens groups, government advisory bodies, and government studies agree that a hierarchy of alternatives for dealing with the waste problem should be adopted.[1] The desireable hierarchy consists of the following alternatives:

(a) reduce the amounts of wastes generated;

(b) recycle or reuse the waste that is generated;

(c) provide on-site treatment to neutralize the waste;

(d) provide off-site treatment and disposal only as a last option.

Despite repeated provincial support and encouragement for such an approach, industry committment to reuse, recycling, recovery and reduction of hazardous waste has been marginal. For example, the Ministry provides 50% of funds for municipal waste management planning. They also monitor the market for recovered material, provide funds for source separation programs and provide funds for resource recovery programs. In October 1983, the Minsitry announced the granting of $110,000.00 to the Total Recycling System Ltd. of Kitchner, Ontario for the establishment of a pilot recycling program. Despite this effort, the Ontario Waste Management Corporation reports that of the less than 10% of the 1.5 million tons of waste requiring special treatment only 1% is being recycled or exchanged.(2) The Ministry of the Environment has considered legislation demanding the use of the 4Rs for some hazardous waste, but decided against this route, resting its hopes instead on industry voluntarily opting for the non-disposal option influenced by economic self-interest as disposal costs increase and markets develop for alternatives, such as recycled goods.

Reduction, reuse, recycling and recovery are critical components of sound long-term waste management planning. However, it is our contention that a voluntary approach based solely on incentive and better education of industry and the public alone will not be sufficient to encourage their use and implementation. We therefore would recommend that mandatory measures be considered to augment the proposed pricing and educational program mentioned in the Blueprint.

Some jurisdictions have enacted legislation banning disposal of hazardous wastes. California, for example, banned the land disposal of 6 categories of hazardous waste.(3) To encourage alternatives to land disposal, the State of California enacted legislation that requires the recycling of hazardous wastes where it is found that this would be economically and technolotically feasible.(4) The State of California authorized the Department of Health Services to prepare a list of hazardous wastes which the Department found to be economically and technologically feasible of being recycled.(5) Failure to comply with an order to recycle results in the assessment of fees for disposal in amounts which may be up to two times the base fee paid under the annual fee schedule which also is established by the Director.(6) If the hazardous waste cannot be recycled it would then be directed to the next best alternative to disposal with landfilling being the last alternative. A report prepared by the California Office of Appropriate Technology states 75% of hazardous waste can be reduced, recycled or treated.(7)

Although we recognize the value of implementing the 4Rs, we also recognize that there are some limits. Alternatives to land disposal which may prove to be harmful to the enivronment are not viable. For example, some forms of recovery and recycling have been known to cause severe environmental problems. The use of energy from waste must meet environmental standards and the same consideration should be applied to recycling operations. We recommend that the term "recyclable material" be better defined to omit certain practices which are environmentally unsafe. For example, the use of waste oils as dust suppressents should not be considered to be a form of recycling. Although the Blueprint suggests that only four substances, which it feels are environmentally safe, be used for road oiling

there is no provision to screen new chemicals which may appear in the future. The use of food processing waste, such as whey, as low grade fertilizer has led to several incidences of pollution of surface waters, emissions of unbearable odours and pollution of nearby wells.(8) Instead of easing controls to encourage the recycled use of these materials as the Blueprint recommends, we suggest that environmentally unsafe methods of recycling and reduction be subject to regulation. In addition, we recommend that recyclable hazardous material transported on public highways not be exempt from waybill provisions.

Mandatory reduction, reuse, recycling and recovery should also be considered for non-hazardous wastes. Legislation should be introduced providing for a greater use of refillable bottles for food and beverage containers. New York State has passed a bill requiring the use of reusable or recyclable bottles.(9) Incentives such as the introduction of more money-back containers could be introduced to encourage consumers to return reusable bottles. In addition, more depots should be placed for the return of recyclable bottles and cans. Furthermore, we feel that a "Fair Packaging Act" based on a ratio of packaging to content would reduce the amount of needless over-packaging. Such an Act would have the support of consumers insofar as it would force producers to more efficiently market their product. A federal-provincial task-force should be created to study the possibility of devising a Fair Packaging Act.

III. WASTE MANAGEMENT MASTER PLAN

In the Blueprint, the Ministry of the Environment

discusses the value of implementing Waste Management Master Plans (Appendix 9). We see the Master Plans as an ideal tool for enacting the 4Rs.

Long range waste management planning must be done in order to effectively deal with hazardous and non-hazardous waste in ways that are environmentally sound. However, we find the Blueprint proposal, which recommends mandating area waste management alternatives for their region, to be insufficient for promoting alternatives to land disposal. We agree that before the recycling, reduction reuse and recovery programs can be undertaken, studies should be done to examine the type of waste produced, the quantity of waste produced, and the best method of dealing with these wastes. Once this information has been accumulated, the regional waste management planning committees should be required to produce workable plans for reducing, reusing, and recycling and recovering of wastes. The province should establish targets which the areas should strive to meet within the span of the planning period. Land disposal should be considered as the option of last resort and only implemented for those wastes where alternate methods cannot be found.

Without these provisions, the Ministry's recommendations for Area Waste Management Master Plans would appear to be nothing more than long-term planning for landfill sites. This would be in conflict with the Blueprint's principle of minimizing landfill. In addition, if there isn't a standardized approach to dealing with waste, it is a possible that landfill ghettos could emerge in parts of the province where for some political reason the Area Waste Management Committee decided against

alternatives and in favour of the landfill site option.

Instead of relying on the Area Waste Management Master Plan to develop options, the Ministry of the Environment should establish its goals for the Area Waste Management Steering Committees and recommend some of the tools which can be used to meet those targets. The Ministry of the Environment should offer financial and technical advice to Area Waste Management Steering Committees in order that they may best tackle the problem of waste in their areas. In addition, the Steering Committees should have input from public groups and the final Area Waste Management Master Plan should be subject to the environmental assessment process.

The process of developing Area Waste Management Master Plans could be the stimulus required to begin the public awareness program which focuses on alternatives to traditional methods of disposing of wastes. The public awareness program should focus on the need to make the generators and the consumers of products responsible for the waste they produce. The full burden for dealing with wastes should not be borne by the residents adjacent to the waste management facility.

IV. APPROVAL PROCESS FOR SITING OF NEW FACILITIES AND EXPANSION OR ALTERATION TO EXISTING FACILITIES

The Canadian Environmental Law Association welcomes the Blueprint recommendation that the Environmental Assessment Act be used more often in the approval process. However, we maintain that the Environmental Assessment Act should be used in all site approval cases, private and municipal, on-site and off-site,

and also for mobile units. Exemptions should not be granted to sites containing less than 100,000 tonnes and neither should Class 1 private industrial facilities be exempted. In essence, we recommend that all facility approvals, regardless of size, ownership and location be subject to the Environmental Assessment Act and that hearings under the Environmental ~~Assessment~~ Protection Act should be curtailed as they do not require the consideration of alternatives.

A. Intervenor Funding

In order that residents living near a proposed waste disposal facility may protect their interest and the environment they should be funded to take part in the assessment process. The evidence considered by the Board is usually delivered by experts. Proponents of a waste disposal facility generally have sufficient funds to cover the costs of hiring their experts. Citizens groups have in the past raised funds from bake sales, membership fees or other fundraising means. In most cases, this barely enables them to hire technical experts for minimal appearances at a hearing. Delays and lengthy proceedings make it extremely difficult for citizens groups to present the best possible case.

In recognition of the residents' right to a fair hearing, and also in keeping with the principle that all those who benefit from the siting of a waste disposal facility should shoulder the cost, and that prospective residents living near the proposed site should not have to face the entire burden, we recommend that these funds be collected from the proponent, the provincial and municipal governments, with some contributions from the waste generating

industry. The money should be deposited with the Environmental Assessment Board who would administer the Environmental Assessment Intervenors' Fund. The deposits should be made at the time when the proponent officially applies for an approval and begins work on the environmental assessment document. The Board should have the power on hearing an application from a citizens' group to grant funding prior to a hearing to enable them to locate expert witnesses at the beginning of the process.

In situations where two or more citizens' groups apply, the Board may request that the groups form a coalition for the purposes of the hearing. The funds should be granted sufficiently in advance to enable the citizens' group(s) to adequately prepare the case. If such an amendment is accepted it should also apply to the Consolidated Hearing Act.

B. Mediation

The length of hearings could be substantially reduced if more effort was devoted to the mediation of a dispute prior to the beginning of a hearing. Given the public's perception of the Ministry of the Environment's role in the approval process, we would recommend that the mediation should be conducted through an independent mediator rather than through the auspices of the Ministry of the Environment. In addition, the Ministry may want to participate as a party in the mediation. The funding provisions would also apply to mediation. If the mediation breaks down, an Environmental Assessment Hearing would be convened to resolve the outstanding issues.

C. Right of Appeal to Cabinet

There is generally a feeling of uneasiness about the

provision in the Environmental Assessment Act and the Consolidated Hearings Act which enables a Board decision to be appealed to Cabinet. In the Oxford County case, a Joint Board under the Consolidated Hearings Act decided to reject the application of a proponent for the development of a new waste disposal facility to serve the County. The rejection was based on findings by the Board after a very lengthy hearing during which time all technical evidence was aired and subject to cross-examination. The Cabinet made their decision on the basis of submissions by the Ministry of the Environment that were not subject to evaluation or cross-examination by the other parties to the hearing. The Ministry's submissions to Cabinet were withheld from other parties until the township involved raised the matter publicly.

As we have mentioned, hearings are an expensive proposition for citizens' groups. To have a Board accept technical evidence and reject a site, only to have the Cabinet overturn that Board's decision, is unfair. Therefore, we suggest that the Environmental Assessment Act, the Consolidated Hearings Act and, whenever it is used, the Environmental Protection Act, be amended to limit the appeal to the Cabinet. The following alternatives should be considered: (a) allow neither party to appeal to Cabinet and make the decision of the Board final; (b) allow an appeal to Cabinet only when the site has been approved but never when the site has been rejected after a hearing has considered lengthy technical evidence. There is a precedent to support this later view in the Ontario Waste Management Corporation Act which states that the Corporation cannot go ahead with a site if the Hearing Board turns it down.[10]

D. The Environmental Assessment Board

At present, there exists no criteria by which members of administrative tribunals are chosen: The guiding factor in appointments appear to be the political affiliation of the appointee. To provide for appointments based on merit, interest and ability, we suggest a non-partisan screening committee be instituted, composed of members of the Legislature, to oversee appointments to the Environmental Assessment Board, the Ontario Municipal Board and other tribunals. The public should be able to attend the question the candidates.

E. The Environmental Appeal Board

At present, under the terms of the Environmental Protection Act, a proponent may appeal an unfavourable finding of the Environmental Assessment Board or a decision of the Director to the Environmental Appeal Board. The public does not have the same right. We recommend that the public be given the right to also initiate appeals before the Environmental Appeal Board.

F. The Role of the Ministry of the Environment and the Procedure for Approvals

The role of the Ministry of Environment in the procedure for approvals should be redefined at the pre-hearing and hearing stage.

During the pre-hearing stage, the Ministry often reviews and accepts proponent's plans under the Environmental Protection Act. In cases where the Ministry of the Environment supports the proponent's proposal, it amounts to a stamp of approval which may carry great weight at an Environmental Assessment hearing.

Despite the problem, however, we submit that the Ministry should take positions with respect to the appropriateness of specific proposals, and if it wants its opinion considered it should provide technical evidence in support at a hearing. Currently, regional hydrogeologists are not always adequately qualified, so technical expertise may have to be improved in order to consistently assess and put forward positions.

What must be avoided is the appearance of collusion with the proponent while preventing intervenors from gaining access to Ministry information and assistance. Also, early and unqualified assurances of approvals to a proponent should never take place.

The Ministry should prepare its position to the extent that it can be cross-examined as a party to a hearing. It should receive no special favours or opportunity for input where other parties are denied that same input. The Ministry's involvement with the appeal to Cabinet on the Oxford County site, where it put forward new submissions to cabinet, which were not subject to cross-examination, tarnished its image substantially. The process in the end was seen to be politically determined and unfair.

The Ministry must decide how it is going to participate in hearings and apply its decision consistently. Given the fact that the Environmental Assessment Board is increasingly calling the Ministry to account for its opinions; that decision should be in favour of participating as a full party.(11)

G. Appeals to the Ontario Municipal Board

The Blueprint recommends that the Ontario Municipal Board be the body used to resolve conflicts between

municipalities over the location of regional waste disposal facilities. We assume the conflict over the location of a site will stem from the Area Waste Management Master Plans recommendations. The Ontario Municipal Board should not be used to resolve disputes of this nature. The discussion of alternative proposals contained in an Area Waste Management Master Plan is ideally suited to the Environmental Assessment Act or a Joint Board hearing under the Consolidated Hearings Act if planning matters are also discussed. Since the various alternatives would be reviewed in detail by either the Environmental Assessment Board or the Joint Board, we recommend their decision be final.

In view of our earlier comments about the nature of the Area Waste Management Master Plans, we envision them to discuss alternative methods for implementing programs for reducing, recycling and recoverying wastes which would reduce the need for land disposal.

H. Protection of Community Rights

The Environmental Assessment Act and the Environmental Protection Act should recognize that communities playing host to the waste disposal facility have certain rights and interests which must be protected. We see these as rights including:

(a) the right to expect protection against environmental damage;

(b) the right to information about the operation of the waste disposal facility;

(c) compensation for the loss of property values and impairment of health;

(d) and the right to public funding so that the public may represent its interests at a hearing.

Although these rights are not currently enshrined, the basic tenets should be readily acceptable, except perhaps for the right to compensation for the loss of property values. With respect to those, we suggest new legislation be adopted or amendments made to the Environmental Protection Act to provide for methods of compensating nearby residents for losses of value to their property or business occurring as a result of having a waste disposal facility located in their vicinity. The level of compensation should be determined through the comparison of market prices before and after the siting of the facility and to homes of similar value in areas without waste facilities. A fund should be created and based on levies made on industries and contributions from the provincial government. The fund can be part of a larger compensation fund.

I. Monitoring Committee

A monitoring committee should be established for each facility that is approved or in existence. The purpose of the monitoring committee would be to ensure that once a facility is approved it functions according to the conditions in the Certificate of Approval. It would also receive quarterly reports on the monitoring results and of any other tests taken to determine emission levels while the site is in operation and during the full extent of the perpetual care program. Monitoring committees should also have the power to enter and inspect a site at anytime. The committee should have the power to initiate more thorough investigations by the Ministry of the Environment. If after the committee's investigation, the Ministry chooses not to enforce the provisions of the Act or the conditions of

the Certificate of Approval, the committee would have the power to petition the Minister for enforcement. If the matter is not resolved, and the committee is in possession of solid evidence, the facility may be forced to shut down until the matter is resolved to the satisfaction of the committee. The committee should have a budget with which it can hire experts and conduct independent testing.

In addition, the committee should serve as a repository of essential information about the facility. It should have copies of the Certificate of Approval, envirnonmental assessment documents, engineering reports, contingency and closure plans, a copy of the environmental insurance plan in effect for the site, any correspondence between the Ministry and the site operator with respect to the operation of the site, records of waste allowed into the site, records of wastes entering the site and the source of these wastes, notification of appeal to the Hazardous Waste Listing Committee, and the names of the manufacturers whose wastes are disposed of at the facility. The monitoring committee should also be able to initiate changes to the classification of hazardous waste if it feels that certain wastes thatare not classified as hazardous should be included on the lists of hazardous wastes.

The Committee would be composed of all those who have an interest in the operation of the site and in the impacts that result from site operation. It would have a representative elected by interested residents; a representative from the local council, preferrably, the alderman or a representative from the ward in which the facility is located, a representative from the public health unit, a sociologist or psychologist,

a representative of local industry and the owner of the waste disposal facility, and a representative of the Ministry of Environment District office.

V. PERPETUAL CARE

The Canadian Environmental Law Association agrees with the Ministry of the Environment's suggestions recognizing the necessity for establishing a perpetual care program in order to provide funds for clean-up and for victim compensation.

Of the alternatives suggested, Alternative A, calling for the utilization of all three funding mechanisms: environmental liability insurance, the posting of surety bonds, and waste management security funds, up until the expiration of the perpetuity phase, is the most comprehensive option available. Alternative A would provide maximum assurances that an adequate compensation and clean-up take place well into the perpetuity phase. In the worst case scenario, these three funding mechanisms would compliment each other in order to adequately fund the clean-up of the site and to compensate victims. We would however recommend that municipalities should be required to post surety bonds, as is required of the private site operators.

A. Environmental Impairment Liability Insurance

The Ministry of the Environment should make it mandatory for all operators of waste management facilities, including landfill sites, energy from waste incinerators, and hazardous liquid waste recycling operations, to have environmental impairment insurance. Option 2, calling for one provincial wide policy with names of the approved waste management facility owners as insured parties appears to be the most attractive option insofar as it is easy to

administer and in that it may also have cost advantages. However, CELA would support a proposal based on individual policies or individual operators if the terms of the individual policies were adequate to provide for coverage of off-site, sudden or non-sudden, accidental or non-accidental release of contaminants into the environment which result in personal injury, property damage, or environmental damage. If this latter option is preferred, the Ministry of the Environment must develop provincial wide standards which each site insurance policy must adhere to.

B. The Waste Management Security Fund

We agree with the Ministry of the Environment that a waste management security fund should be created to cover the risks in perpetuity from the operation of waste management facilities. Ideally, the fund should be large enough to cover potential problems that arise from the generation, transportation and disposal of hazardous wastes. The fund should also provide money to assist clean-up of abandoned as well as existing and operating sites. The Ministry of the Environment has already recommended and made changes to Part IX. Section 80 of the Environmental Protection Act makes the owners and handlers of pollutants responsible for reporting and cleaning up of spills, and restoring the environment to its original condition and also for reimbursing the victims of spills for damages to property or health, and financial loses. The Act also authorizes the establishment of an Environmental Compensation Corporation to provide victims with funds under certain conditions.

Unfortunately, exempted from Part IX are spills of pollutants from the operation of waste disposal sites operating in accordance with a Certificate of Approval. Part 9 still has not been proclaimed

even though draft regulations have been prepared. We would suggest that the provisions of the Environmental Compensation Fund under Part IX be joined to the Waste Management Security Fund proposed under Part V of the Environmental Protection Act.

We recommend that the Fund be based on the imposition of a basic pollution levy on all industries which produce quantities of hazardous waste, and the worst polluters would pay an added surcharge.(12) Additional contributions would be made from money collected from tipping fees imposed on the receiver of hazardous wastes. This surcharge would be based on the volume of waste entering the site and the degree of toxicity of the waste which enters the site. The provincial government should be required to contribute some money towards the fund, especially in the start-up phase.

Industry argues against an industry-wide levy on the grounds that it is intrinsically unfair because it would impose liability without fault and consequently would not encourage a high standard of care by that industry.(13) It is our position that an industry-wide levy is indeed fair, especially if taken from the point of view of the victim of pollution.(14) First, of the common law remedies available only negligence depends on fault. Second, an industry-wide levy would negate a need for determining who was individually responsible for a leak or a spill since this would be extremely difficult in cases where waste streams were mixed during disposal operations. Third, a levy would be the preferred method for internalizing industries cost for the environmental damage which is caused by the production of their commodity. Fourth, when confronted with leaks and spills from an abandoned site where records

were not kept, it is next to impossible to determine responsibility. In these cases, the industry as a whole should be responsible for a clean-up of these problems. Fifth, clean-ups and compensation of damage arising from illegal dumping would also be covered by an industry-wide levy. Sixth, it would provide compensation in cases where the responsible party was known, but would not agree to compensate or became insolvent or bankrupt. It is our position that a person suffering a substantial loss that he was not in a position to prevent or avoid, and as a result of the actions of some third party, should not have to undertake expensive legal proceedings or incur delay to obtain compensation.(15)

C. Victims Compensation

In the United States, the Environmental Protection Agency's Superfund uses the levy approach. Although, the Superfund does not yet have provisions for victims compensation, a recent study mandated under the terms of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 recommended the creation of a new federally-supervised compensation system and a "new superfund" for the payment of compensation to persons injured by exposure to releases of hazardous wastes.(16)

The State of California imposes a disposal surcharge on the facilities operator, and the person or company which disposes of the waste at the site. The State of California also has in place a Victims of Hazardous Substances Fund.(17) If determined to be elegible by an examining board, victims of pollution in California may be reimbursed for 100% of uninsured, out-of-pocket medical expenses for up to 3 years from the beginning of treatment and 80% of lost

wages, up to $15,000.00 a year for 3 years.[18] Although, this type of fund may not be the ideal model to adopt, it nonetheless is a major step forward.

The creation of victims compensation fund as a component of a pollution victims compensation fund should not in any way restrict the claimant from pursuing court action in cases where the responsible party has been identified. The fund is basically an interim measure which is inadequate to deal with long-term compensation.

D. Clean-up

Once a fund, a bond and an insurance scheme is in place, a definition for what constitutes an adequate clean-up must be developed. It is our position that a clean-up of pollution problems must ensure that the source of the hazardous waste that leaked into the environment must be removed or contained to the level that it no longer contaminates off-site and thereby no longer poses a threat to the health and well-being of nearby residents. Cosmetic or inadequate clean-ups should be avoided.

Standards for emission limits should be established by regulation. Once standards exceed the recommended level, clean-up action begins. Standards should be established with the full consultation of the public.

The size of the Waste Management Security Fund should be large enough to meet clean-up costs. A formula proposed in Appendix 3, based on the American experience, may be inadequate, especially since the legislation in the United States does not define the extent to which a site must be cleaned up.[19]

Therefore the money spent per site may be under estimated.

Ideally, the fund should be national in scope because it would collect levies from industries which may not produce in the province where the waste is finally disposed. However, jurisdictional and structural constraints may be barriers to the establishment of a national fund. Until a workable National Program can be developed, Ontario should establish a fund on its own. When a national fund is developed, Ontario's program could be amalgamated with it.

VI. MONITORING AND ENFORCEMENT

In addition to ensuring that funds are avialable for clean-up and compensation of victims, a perpetual care program must be able to provide for extensive monitoring of existing and abandoned sites to determine if and when a leak, spill or emission is occurring.

The Ministry of the Environment must also increase its capability for enforcing the Environmental Protection Act. The experience of communities near waste disposal facilities is that the Ministry's enforcement of regulations and legislation has been unsatisfactory. The public expects the Ministry to stringently enforce environmental legislation and regulations. In some cases which we are familiar with, the Ministry of the Environment refused to prosecute offenders even though they were aware of violations of the Act and the Certificate of Approval. In order to prevent this, consideration should be given to making enforcement of violations mandatory rather than discretionary. Failing that, residents should be given the right to force the Ministry to enforce the provisions of the Act.

VII. WAYBILLS AND MANIFESTS

The introduction of a waybill system in Ontario has generated useful data on the volume of liquid industrial wastes, their sources and final destinations. However, the deficiencies in the system mean that a large quantity of special waste is not being recorded. According to an OWMC study, 16 million gallons or 5% of the 330 million gallons produced annually in the province are not accounted for.(20) The Blueprint proposal requiring the registration of waste generators is a step towards overcoming some of these deficiencies. We recommend that the registration requirement also be extended to cover small generators.

The Blueprint proposal to make the waste generator responsible for specifying the final disposal facility is a step in the right direction. However, it applies only to waste leaving a site for off-site disposal and only to hazardous waste in liquid form.(21) If the purpose of a waybill system is to track and record all hazardous waste produced then it should apply to waste disposed on-site and also to small quantities of hazardous waste. A method for checking the accuracy of the generator's description of the waste should also be established. The experience in the United States, where such provisions are in use, has been that generators frequently falsify these records.(22)

More severe penalties should be recommended for those who falsify waybill information. A system of random highway spot checks should be used to take samples of waste in order to compare the content with the wastes described on the waybill. Labelling requirements identifying the contents of waste and the name of the generating company on drums or loads of hazardous waste should be adopted. Present Ontario law does

not require most hazardous waste in drums to be labelled.[23]

In order to overcome some of the remaining gaps in the present system, we recommend that the waybill systems be extended to include wastes that are disposed on-site, wastes that are wholly used or recycled (for example oils used as dust suppressants are not currently waybilled). Changes must be made to obtain more complete data on the quantities of waste generated. All information gathered through the waybill system should be readily accessible to the public.

VIII. DEFINITION AND CLASSIFICATION

The approach to defining waste recommended by the Ministry of the Environment using the listing and testing of waste appears acceptable to us. It is important to determine what constitutes hazardous waste to be able to determine the amount of waste in need of special treatment. We would recommend that once a suitable system of definition for hazardous waste is developed that efforts be made through federal-provincial cooperation to make the definition uniform across the country in order to prevent the creation of waste havens in provinces with weaker criteria.

Although in some cases the mere classification of a waste in a category or type is sufficient to determine the best disposal method in some cases it is not evident. Therefore, we recommend that along with defining and classifying waste, the Ministry of the Environment undertake an investigation to determine the best disposal option for the different categories. The Ministry should determine whether a waste can be reduced, reused, recycled or recovered.

We also have some reservations about the Blueprint's recommendation that the generator of the waste determine the hazardousness of a site specific waste. The generator has a financial self-interest to downgrade the hazardousness of the waste, especially if a higher disposal fee is charged on the more toxic waste. Therefore we suggest the Ministry labs or the local public health department be responsible for the testing. The testing methodology and analysis should be available to the monitoring committee. Also, if the leachate extraction procedure to compare predicted leachate quality with the drinking water quality criteria is used we recommend that the drinking water criteria be adopted as a regulation.

The Blueprint recommends the creation of a Hazardous Waste Listing Committee. Such a committee would have the power to review classifications and recommend changes to the classifications. The description of the committee in the Blueprint gives us cause for concern. First it's extremely unfair that only the generator may apply to have a chemical delisted. We maintain that the public should also have the right to make application to have waste classified. In addition, in cases where a generator does apply for a delisting, the public, especially those who live near a waste disposal facility which may receive the waste, should be notified of the application sufficiently in advance of a hearing. Copies of the application for delisting a waste should be available to the public. In addition, the public should be able to make application to have new hazardous wastes classified as they come into production in the province. At the outset, the committee should be mandated to hold public hearings into the classification scheme recommended in the Blueprint.

We have reservations about the recommendation that would exempt small quantities of hazardous waste from the classification system. Toxicity, not quantity of waste should be the main consideration for listing a waste. Small quantities of highly toxic wastes from large numbers of different sources can quickly accumulate over time to create a major problem. Therefore we recommend that small quantities not be exempted from the classification system.

We are also concerned that the definition of liquid industrial wastes will be based on the degree of slump. This is not satisfactory since it is possible to add material to harden the substance sufficiently to meet the slump test without adding permanence to that solidity.

CONCLUSION

The release of the Blueprint indicates that Ministry of the Environment recognizes the present system of dealing with waste is inadequate and that change is required to improve waste management in Ontario. The Blueprint is a significant step forward and establishes fine principles and objectives that should be implemented soon. However, more detail is required about how the Ministry of the Environment intends to make these principles and objectives a reality.

We advise the Ministry of the Environment that the following are our recommendations:

1. Mandatory measures should be enacted to implement the 4Rs. Land dispoal should be minimized;
2. Financial incentives for industry and consumers and education programs should compliment the mandatory measures;

3. Access to information must be assured for the public. Public participation in waste management decisions depends on the right of the public to information.

4. The Environmental Protection Act should be amended in order that the rights and interests of residents living near waste disposal facilities are protected.

   - The Act should stress the principle that all those who benefit from the products which generate the waste must take responsibility for the disposition of the waste;
   - When a waste management facility is selected the nearby residents must be funded so that they may hire experts to represent their interests at hearings;
   - If a site is approved perpetual care monitoring of the site from its development through to the post-closure phase must be undertaken;
   - When spills or leaks occur they must be cleaned up properly. In cases where damage occurred to a person's property, health or income compensation must be awarded.

5. Changes should be made to the approvals process to make it fairer. The Ministry must clarify its role during the hearing process. Appeals to Cabinet must be eliminated or restricted.

6. The Ministry must also improve their enforcement of legislation and regulation.

7. Changes must be made to the waybill and manifest system to ensure that all hazardous waste material produced is tracked and recorded.That includes

small quantities of hazardous wastes as well as recyclable hazardous material.

8. In addition, the Ministry must ensure that the system of defining and classifying waste is explicit enough to ensure that the best disposal alternative can be selected.

9. Care must be taken not to promote recycling or recovery activities which are as harmful to the environment as landfilling.

We expect that more detailed proposals will be offered in the near future. We look forward to receiving and giving you our comments on them, as well as on the draft legislation arising out of the Blueprint process.

X. FOOTNOTES

1. British Columbia, Ministry of the Environment: Hazardous Waste Management in British Columbia, Report of the Hazardous Waste Management Committee, Victoria, 1981 at p.1-1

   See also Environment Council of Alberta: The Management and Disposal of Hazardous Waste: The Administration and Regulation of Hazardous Waste, Bulletin No.2, January 1980 at p.25

   See also Ontario Ministry of the Environment: Blueprint for Waste Management in Ontario: Appendix 1, Waste Management Consultation Session Report

2. Ontario Waste Management Corporation: The OWMC Exchange, Vol. 1, No. 2, September 1982 at p.3

3. State of California, Office of Technological Alternatives, Managing Hazardous Wastes for a Non-Toxic Tomorrow, October 1981 at p.4
   The six categories of wastes banned from land disposal are:

   1. PCB's
   2. Pesticides
   3. Cyanide
   4. Toxic Metals
   5. Halogenated Organics
   6. Non-halogenated Volatile Organics

4. State of California, Department of Health and Services, Hazardous Waste Control Law Excerpt from Health and Safety Code, Division 20, Chapter 6.5 Hazardous Waste Control, Chapter 6.8 Hazardous Substance Account; Department of General Services Publications section, North Highlands, California at p.24
   Section 25175 reads as follows:

   (a) The department shall prepare and adapt and may revise when appropriate a list of hazardous waste which the department find are economically and technologically feasible to recycle. Each substance shall be categorized according to the degree of difficulty and the kind of difficulty encountered in recycling that substance. Whenever any waste on the list is disposed of by a person, the department may request, and the producer or disposer of that waste shall supply the department with a formal, complete and detailed statement justifying why the waste was not recycled.

If the request is made of an entity listed in Section 25118 other than by an individual, the statement shall be issued by the responsible management of that entity. The department shall keep confidential any trade secrets contained in such statements.

(b) If, after receipt of the statement described in subdivision (a), the department finds recycling of a hazardous waste to be economically and technologically feasible at the site of production, as determined by the site operator, or, if the department provides the name of a ready, willing, and able purchaser of the recyclable waste, the disposer of the hazardous waste shall recycle the hazardous waste by either of the above-described methods. Failure to comply with an order to recycle by either of these methods shall result in the assessment of fees pursuant to Section 25174. The Director may establish fees for the disposal of hazardous waste deemed to be recyclable in amounts which may be up to two times the base fee paid under the annual fee schedule established by the Director.

5. Supra, note 3 at p.3,4,5,6,7,8 and 9

6. Ibid.

7. Alternatives to Land Disposal of Hazardous Waste: An Assessment for California, Toxic Waste Assessment Group, Governor's Office for Appropriate Technology, 1981, p.183.

8. Regina v. Spatoro Cheese Products Ltd. reported in Canadian Environmental Law Reports, Vol.10, August/ October 1981

9. Conversation with Chuck Bassett, Assistant Commissioner of Information, Department of Environmental Conservation, Albany, New York
The New York Bottles and Cans Legislation was passed in July 1982, amended in July 1983 and became effective on September 12, 1983. In essence, the act requires a five cent deposit on all pop and beer bottles and cans. A deposit was also required on imported pop and beer by the first importer. Non-returnable bottles have been banned, as have cans with loose pull tabs. All pop and beer bottles and cans must have a permanent stamp stating it has a New York State Refund of five cents.

The Department of Environmental Conservation expects about 80% of bottles and cans to be returned, the remainder would be lost or broken. The money collected from the deposit is distributed down the line. One benefit which is derived from the Returnable Bottles and Cans Legislation is that the Manufacturers eventually get the use of $50 million floating through the market in returnable bottles and cans. A fine of $250.00 or $500.00 can be afixed upon conviction for any manufacturer, distributor or retailer who fails to comply with the Act.

10. Ontario Waste Management Corporation Act, R.S.O. 1981, c.21, s.15(2)

11. County of Northumberland Application for a Proposed Landfill Site in Seymour Township, a Hearing Under the Consolidated Hearings Act
The Board, in a hearing on an approval of a waste disposal site in the Township of Seymour, ordered the Ministry to give evidence on the hydrogeological aspects of the proposal.

12. Castrilli, Joseph. Hazardous Waste Management in Canada: The Legal and Regulatory Response, The Canadian Environmental Law Association, September 1982 at p.65

13. Ibid. at p.158

14. Ibid. at p.158

15. Swaigen, John Z. Compensation of Pollution. Victims in Canada, Economic Council of Canada, 1981 at p.2,3,6

16. National Resources Law Newsletter, American Bar Association, Spring 1983, Remedies for Victims of Toxic Torts: The Report of the Section 301(e) Study Group by William Hassler, p.5 and p.6.
The Section 301(e) Study Group recommended that victims still should be able to bring direct civil actions. To make it easier for victims to initiate suits, the study group recommended the adoption of a statutes of limitation based on the discovery rule, and also the adoption of a standard of strict liability for polluters.

In addition to direct civil suits, the study group recommended the formation of a new administrative remedy similar to workers' compensation as a means for allowing victims to seek redress for

breaches of RCRA's cradle to grave system of regulating generation, transportation, treatment, storage and disposal of hazardous wastes. This option would allow injured persons to seek compensation for medical costs and lost earnings not exceeding $2,000.00 per month, as well as death benefits. Other compensation for pain and suffering, property damage and punitive damage would be available only through a separate legal action. The compensation scheme would be based on a relaxed standard of proof for causation of injury. Double recovery of damages would be barred.

17. State of California, Department of Health Services, Hazardous Substance Victim Compensation Application Brochure

18. Ibid.

19. Solid Waste Management, October 1982, EPA Readies State Siting Program
The Office of Technological Assessment points out that the Environmental Protection Agency does not have specific guidance on the extent of clean-up required. OTA pointsout this could result in temporary or inadequate remedies.

20. Dr. D.A. Chant, Chairman and President of the Ontario Waste Management Corporation, Press Conference remarks on the Phase 1 Study Results (Toronto, September 1982), p.78
See also Waste Quantity Study, OWMC, September 1982.

21. Ministry of the Environment, Blueprint on Waste Management: Appendix 8, Proposed Generator Regulation, June 1983

22. New York Times, Sunday, June 5, 1983 "Illegal Dumping of Toxins Laid to Organized Crime."

23. Globe and Mail, August 2, 1983: "Wastes from U.S. follow strange path after crossing border"